Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity

by Erwin Chemerinsky*

American schools are separate and unequal. To a very large degree, education in the United States is racially segregated. By any measure, schools are not equal in their resources or their quality. Wealthy suburban school districts are almost entirely white; poor inner city schools are often exclusively comprised of African-American and Hispanic students. Forty years after *Brown v. Board of Education* proclaimed that separate can never be equal in public education,[1] American schools are racially segregated and grossly unequal.

How did this come to happen? How was the majestic promise of *Brown* lost? There is no simple or single answer to the question. The task of equalizing educational opportunity has been far more difficult than ever could have been imagined forty years ago. White flight to suburban and private schools frustrated desegregation in most cities. Equalizing expenditures is usually a political impossibility. Intense opposition exists at every step along the way to meaningful desegregation or equalization of school funding.[2]

In this paper, I argue that one factor contributing to the failed promise of equal schooling was the decisions of the Burger Court in the 1970s. The 1970s was a critical juncture in the battle for educational equality. The massive resistance to implementing *Brown* meant that a long-term

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1. 347 U.S. 483 (1954).

2. For an excellent description of the resistance to school desegregation, see Michael Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 96-129 (1994).

commitment to equalizing education was required. Crucial issues were not presented to the Supreme Court until the 1970s. Most notably, it was not until then that the Supreme Court considered whether disparities in school funding deny equal protection, and whether courts could impose interdistrict desegregation orders that encompass entire metropolitan areas.[3]

I believe that equal educational opportunity only had a chance of occurring if the Supreme Court had ruled that inequities in funding schools are unconstitutional and if it had permitted interdistrict remedies including both city and suburban schools. Yet, the Burger Court rejected both of these possibilities. Although it cannot be proven, there is every indication that the Warren Court would have decided these cases differently. An opportunity for equal schooling was lost.

Part I of this article documents that America today truly has separate and unequal schools. In Part II, I argue that an effective effort at equalizing educational opportunity would have required a long-term commitment from the Supreme Court. In Part III, I contend that the Burger Court decisions of the 1970s doomed the effort for equal educational opportunity. Finally, I look to the future and it seems bleak. Meaningful reform seems to be coming neither from the political process nor from the courts.

Forty years ago, Chief Justice Earl Warren wrote eloquently of the importance of education and of how if America ever is to achieve equality it will be through schooling. He declared: "Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity is a right which must be made available to all on equal terms."[4]

Yet today, equal educational opportunity seems even more elusive than it did a half century ago. Perhaps no judicial decisions could have really made a major difference in light of the lack of a strong public commitment to equal schooling.[5] But it is impossible to know that

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3. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973). (Inequities in school funding do not deny equal protection.); Milliken v. Bradley, 418 U.S. 717 (1974) (limiting the power of courts to impose interdistrict desegregation orders).

4. 347 U.S. at 493.

5. *See* Gerald Rosenberg, *Hollow Hope: Can Courts Bring About Social Change* (1991) (arguing that inherent limits on the judicial power meant that the Court could do little to bring about successful social change, such as equalizing educational opportunity). For an excellent critique of Rosenberg's methodology and conclusion, see Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1029 (1992) ("[The Hollow Hope] deserves harsh criticism because its conclusions are checkered by problems of emphasis, articulation, and analysis.

because the results of the path not taken never can be known. I strongly believe that there was a meaningful opportunity for judicial action to make *Brown*'s promise a reality and that this opportunity was lost because the cases were decided by the Burger Court and not its predecessor.

I. SEPARATE AND UNEQUAL SCHOOLS

Racial segregation in American schools has been increasing over the past decade. A study by the National School Boards Association found "a pattern in which impressive progress toward school integration among blacks and whites during the 1970s petered out in the 1980s."[6] The report predicted that in the 1990s, "large-scale resegregation could be the order of the day in much of the country."[7]

In virtually every area of the country, racial separation in schooling is increasing. In the Northeast, for example, half of the black students in the region attend schools with fewer than ten percent whites and one in three go to schools that are 99 percent or more minority.[8] At the opposite end of the country, in Los Angeles, the percentage of white students in the public schools has fallen from 40 percent to 13 percent since the mid-1970s.[9] In Philadelphia, the percentage of white students has dropped from 32 percent to 23 percent.[10] In St. Paul, Minnesota, the percentage has gone from 85 percent white in the public schools to 55 percent.[11]

In 1980, "63 percent of black students and 66 percent of hispanics were in segregated schools, that is schools with more than half minority enrollment."[12] Today, nationally, two-thirds of all black children attend schools that are more than 50 percent black.[13] The reality is that most

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It endorses inconsistent measure of effective judicial action, focuses on the Court in isolation rather than as part of a larger political culture, uses presumptions hostile to the recognition of a broad judicial role, and employs inadequate data and the questionable portrayals of existing research. To the extent that The Hollow Hope intimates that court reform is an oxymoron, these problems are fatal.").

6. Larry Tye, *Social Racial Gaps Found Nationwide*, BOSTON GLOBE, Jan. 9, 1992, at 3.

7. *Id.*

8. Larry Tye, *U.S. Sounds Retreat in School Integration*, BOSTON GLOBE, Jan. 5, 1992, at 1.

9. *Id.* at 45.

10. *Id.*

11. *Id.*

12. *Illinois Schools Most Segregated*, CHICAGO SUN TIMES, Sept. 5, 1982, at 6.

13. Tye, *supra* note 6, at 45.

children in the United States generally are educated only with children of their race and the separation is increasing.

Perhaps this separation might not matter if students from minority races received the same education as white students. But the reality is that far more is spent on the average white student's education than on the average black student's. For example, in the Chicago metropolitan area, in the Chicago public schools, $5,265 is spent for each student's education; but in the Niles school district, a suburban area immediately north of the city, $9,371 is spent on each student's schooling.[14] In Camden, New Jersey, $3,538 is spent on each pupil; but in Princeton, New Jersey, $7,725 is spent.[15] In 1989-90, New York City spent an average of $7,299 per student, while the nearby district in Great Neck, Long Island spent $15,000 for each child.[16] Not surprisingly, these disparities have a strong correlation to race. For example, in Chicago, 45.4% of the residents are white and 39.1% are African-American; in Niles Township, the percentages are 91.6% white and 0.4% black.[17]

A similar story can be told in virtually every urban area in the country. Two decades ago, noted education expert Christopher Jencks estimated that on the average, 15% to 20% more is spent on each white student's education than on each black student's schooling.[18] The disparities have only gotten worse since then.

Although expenditure levels are only one measure of educational quality, and an imprecise one at that, it is clear that predominately black and Hispanic inner-city schools have much less resources than predominately white suburban schools. Less resources mean that there are higher student-teacher ratios; older and fewer books; fewer teaching tools such as computers; and far less enrichment opportunities. Especially in the 1970s, there was extensive research on the effects of desegregation and expenditures on education. For example, a review of studies on the effects of desegregation on education found that a positive effect was reported in 40 studies; no effect was measured in 21; and a negative effect was seen in only 12 of the studies.[19] Similarly, a review of the literature on the effect of expenditures concluded that, overall, the

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14. JONATHAN KOZOL, SAVAGE INEQUALITIES 85-86 (1991).

15. *Id.*

16. Roberta Steel, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 620 (1993).

17. *Id.* at 620.

18. CHRISTOPHER JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FORMAL SCHOOLING IN AMERICA 28 (1972).

19. Hawley, *The New Mythology of School Desegregation*, 42 LAW & CONTEMP. PROBS. 214, 218 (1978).

majority of studies found a positive relationship between spending levels and educational performance.[20]

By every measure, African-Americans suffer as a result of these inequalities. For example, the drop-out rate for black teenagers is 13.7%, almost twice the drop-out rate for whites, 7.7%.[21] By the sixth grade, "blacks in many school districts are two full grade levels behind whites in achievement. This pattern holds true in the middle class nearly as much as in the lower class."[22] In high school, the tragic pattern continues. For example, in 1980, in Chicago, 25,500 minority students entered high school. Four years later, only 9,500 graduated and only 2,000 could read at grade level.[23]

The costs to individuals and society are incalculable. The loss of human potential is enormous. The inequalities in schooling perpetuate and increase inequalities in society. It is clear that the promise of *Brown* has not been fulfilled and America suffers enormously as a result.

II. AN EFFECTIVE EFFORT AT EQUALIZING EDUCATIONAL OPPORTUNITY REQUIRED A LONG-TERM COMMITMENT FROM THE SUPREME COURT

From *Plessy v. Ferguson*, in 1896,[24] until *Brown*, in 1954, government-mandated segregation existed in almost every Southern state. In 1954, 99 percent of all black children in the South attended all black schools.[25]

After *Brown*, Southern states used every imaginable technique to obstruct desegregation.[26] As Professor Laurence Tribe notes, "Southern resistance took form in judicial hostility, legislative evasion, and popular expression of dissatisfaction."[27] Some school systems attempted to close public schools rather than desegregate.[28] Some school boards adopted so-called "freedom of choice" plans that allowed students to choose the

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20. *See, e.g.*, McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROBS. 415 (1974).

21. John Jacob, Testimony before the House Education and Labor Committee, *Labor-Management Relations and the School-to-Work Opportunities Act of 1993*, Oct. 20, 1993.

22. Claude M. Steele, *The Race and the Schooling of Black Americans*, THE ATLANTIC 68 (April 1992).

23. *Id.*

24. 163 U.S. 537 (1896).

25. Klarman, *supra* note 2, at 9.

26. For a wonderful description of this from a lawyer's perspective, see JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).

27. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1489 n.10 (2d ed. 1988).

28. *See* Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

school where they would enroll and the result was continued segregation.[29] In some places, there was outright disobedience of desegregation orders.[30] The phrase "massive resistance" appropriate describes what occurred during the decade after *Brown*.[31]

The result was that a decade after *Brown*, little desegregation had been achieved. In the South, just 1.2% of black school children were attending school with whites.[32] In South Carolina, Alabama, and Mississippi not one black child attended a public school with a white child in the 1962-63 school year.[33] In North Carolina, only one-fifth of one percent—or 0.026%—of the black students attended desegregated schools in 1961 and the figure did not rise above one percent until 1965.[34] Similarly, in Virginia, in 1964, only 1.63% of blacks were attending desegregated schools.[35]

Yet, the persistent efforts at desegregation had ultimately had an impact. One by one the obstructionist techniques were defeated. Finally, by the mid-1960s, desegregation began to proceed. In 1964, the Court lamented that "[t]here has been entirely too much deliberation and not enough speed" in achieving desegregation.[36] By 1968, the integration rate in the South rose to 32% and by 1972-73 91.3% of Southern schools were desegregated.[37]

Certainly, the Supreme Court might have pushed the process faster, but probably not by very much. The resistance was so great and the techniques of obstruction so varied as to require years of conquering the opposition and going forward with desegregation. Many court orders for desegregation were not put into effect until the 1960s or even the 1970s.[38] Thus, the Supreme Court's relative silence on the issue of school desegregation from 1954 until 1964[39] was not from a lack of interest or political resolve. Until lower courts implemented desegrega-

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29. *See, e.g.*, Green v. County Sch. Bd., 377 U.S. 218 (1964).

30. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

31. For a description of how courageous judges dealt with this resistance, see JACK BASS, UNLIKELY HEROES (1981).

32. Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

33. *Id.* at 9.

34. *Id.*

35. *Id.*

36. *Griffin*, 377 U.S. at 689.

37. Klarman, *supra* note 32, at 10.

38. For example, in Oklahoma City, segregated schooling was not declared unconstitutional until the 1960s and a remedy was not imposed until the 1970s. *See* Board of Educ. v. Dowell, 111 S. Ct. 630 (1991).

39. Cooper v. Aaron, 358 U.S. 1 (1958), is, of course, a notable exception, where the Court ordered the desegregation of the Little Rock, Arkansas schools.

tion orders and courts of appeals ruled on them, there was relatively little that the Supreme Court could do.

Hence, a critical juncture in the fight for desegregation came in the late 1960s and the early 1970s. It was at this point that the Court needed to address the issue of remedies and the problems that were interfering with effective equalization of educational opportunity. For example, in 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*,[40] the Supreme Court attempted to provide guidance to lower courts in structuring remedies to desegregate schools. The Court approved such techniques as redrawing attendance zones and busing of students to achieve desegregation. Although *Swann* was important in approving the techniques that lower courts had developed for achieving desegregation, there is little doubt that the Court would allow such redrawing of districts and reasonable busing based on the age of the students. Few other alternatives existed for ending segregation in *de jure* segregated school systems.

But much more difficult issues faced the Supreme Court in the early 1970s. White flight to suburban areas—in part, to avoid school desegregation and, in part, as a result of a larger demographic phenomenon—endangered successful desegregation. In virtually every urban area, the inner city is predominately and increasingly, comprised of racial minorities. By contrast, the surrounding suburbs are almost exclusively white and what little minority population does reside in the suburbs is concentrated in towns that are almost exclusively black.[41] School district lines parallel town borders, meaning that the racial separation of cities and suburbs results in segregated school systems. For example, by 1980, whites constituted less than one-third of the students enrolled in public schools in Baltimore, Dallas, Detroit, Houston, Los Angeles, Miami, Memphis, New York, and Philadelphia.[42]

Thus, by the 1970s it was clear that effective school desegregation required interdistrict remedies. There were simply not enough white students in most major cities to achieve desegregation. Likewise, suburban school districts could not be desegregated via intradistrict remedies because of the scarcity of minority students in the suburbs. As Professor Smedley explains:

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40. 402 U.S. 1 (1971).

41. Pettigrew, *A Sociological View of the Post-Milliken Era*, in *Milliken v. Bradley: The Implications for Metropolitan Desegregation*, Conference Before the United States Civil Rights Commission 69-70 (1974).

42. Ziemba, *School Desegregation Called Key to City*, CHICAGO TRIBUNE, Feb. 8, 1983, at 3.

> Regardless of the cause, the result of this movement [of whites to suburban areas] is that the remaining city public school population becomes predominately black. When this process has occurred, no amount of attendance zone revision, pairing and clustering of schools, and busing of students within the city school district could achieve substantially integrated student bodies in the school, because there are simply not enough white students left in the city system.[43]

Moreover, efforts to desegregate inner cities, through intradistrict remedies, are often counter-productive because they encourage white-flight. Desegregation of central city schools frequently encourages whites to flee to suburban areas, making desegregation even more difficult.[44]

By the 1970s, the crucial issue—perhaps the single most important issue since *Brown* in achieving desegregation—was whether courts could fashion interdistrict remedies. By then it was clear that desegregating urban schools by relying solely on intradistrict solutions is simply impossible.

Also, by the 1970s, it was clear that to make equal educational opportunity a reality, the Court had to address inequities in school funding. A series of reports and books in the early 1970s documented the enormous inequalities in educational expenditures. In 1971, the National Educational Financing Project issued its report.[45] The report revealed that local property taxes are the primary source of funds for schools in the United States.[46] The result is that wealthy suburban areas have far more to spend on education, with lower property tax rates, than poorer inner-city areas can spend, even with higher tax rates. The National Educational Funding Project concluded: "Variations in assessed valuation of property exist in some states exceeding 10,000 to 1 . . . . Other states have variations on the order of 500 to 1."[47]

Also, in 1971, the California Supreme Court found that the California system of funding schools violated the state constitution.[48] The court noted that "the assessed valuation per unit of average daily attendance

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43. Theodore Smedley, *Developments in the Law of School Desegregation*, 26 VAND. L. REV. 405, 412 (1973).

44. Armor, *White Flight and the Future of School Desegregation*, in SCHOOL DESEGREGATION: POST, PRESENT, AND FUTURE 208 (W. Stephan & J. Feagan eds., 1980).

45. National Educ. Financing Project, *Alternate Programs for Financing Education* (1971).

46. *See also* President's Commission on School Finance, BIG CITY SCHOOLS IN AMERICA 4 (1971) (local property taxes provide about 62% of educational expenditures).

47. National Educ. Financing Project, *supra* note 45, at 41.

48. Serrano v. Priest, 96 Cal. Rptr. 601 (1971).

of elementary schools ranged from a low of $103 to a peak of $952,156—a ratio of nearly 10,000 to 1."[49]

By 1971, it was recognized that the inequities in school funding correlated strongly to race. As a result, achieving racial equality in education necessitated equalizing expenditures. Inadequate resources means that poorer, predominately black, inner city districts hire less qualified teachers and have significantly higher teacher-pupil ratios.[50] The separation of school districts along political boundary lines has created wealthy schools for whites and comparatively inadequate schools for African-Americans and Hispanics. Hence, again, the 1970s were sure to be a critical juncture in the judicial effort to create equal educational opportunity as the Supreme Court was virtually certain to decide a case on the issue.

Also, it was clear that in the 1970s the Court would need to address the issue of segregation in northern city school systems. Until then, cases involved school systems where segregation had been mandated by law. Northern city school systems often were just as segregated, but not as a result of laws mandating separation of the races. Racially separate residential housing patterns, which themselves frequently reflected discriminatory government policies, caused racial separation in schooling. Likewise, attendance zones within school districts often caused segregation. A critical question was how the Court was going to deal with such *de facto* segregation.

All of these issues—the permissibility of interdistrict remedies; the constitutionality of inequities in school funding; the standard for evaluating *de facto* segregation—realistically could not have come before the Court much before the 1970s. Thus, this was certain to be a crucial time in the battle for equalizing education.

As the Supreme Court entered the 1970s, two things were certainly clear. First, effective equalization of educational opportunity would come only through the judiciary. No legislature in the country adopted laws to desegregate schools. The political realities were such that all of the legislative action was in the opposite direction. Racial minorities lacked political clout to secure legislation for desegregation and there was insufficient political support among whites for such legislation. Nor was there any likelihood the school expenditures would be equalized via legislative action. Equalizing schooling necessitated court action and if the judiciary failed, no other institution was likely to do much.

Second, by the 1970s it was apparent that eliminating the vestiges of segregation and equalizing schooling would require a long-term effort.

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49. *Id.* at 606.

50. JAMES COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 1-6, 125-83 (1966).

Jim Crow laws existed for almost a century; their effects could not be erased in a few years or even a decade.

III. How the Burger Court Decisions of the 1970s Doomed Equal Educational Opportunity

Ultimately, the failure to achieve more equality in educational opportunity can be linked to the election of Richard Nixon as President in 1968. Within a few years of his election, four Justices resigned from the Court—Chief Justice Earl Warren and Justices Abe Fortas, Hugo Black, and John Marshall Harlan. Nixon's replacements—Chief Justice Warren Burger, and Justices Harry Blackmun, William Rehnquist, and Louis Powell—were, overall, much more conservative. An analysis of key cases concerning school equality shows that almost without exception all of these Justices voted to limit judicial remedies that would have advanced equality. It is more speculative, but there are good reasons to believe that the cases would have been decided differently had the Warren Court continued to exist or if Hubert Humphrey had appointed the four new Justices.

It is worth noting that the election of Richard Nixon was, in part, a result of the Warren Court's decisions concerning schools. From the Civil War up until 1964, Southern states were uniformly Democratic in presidential elections. In 1964, for the first time since the Civil War, some Southern states voted for the Republican candidate, Barry Goldwater. Even more Southern states voted Republican in 1968 for Nixon. Why the shift? To some extent, it was a reaction to the desegregation orders. Civil rights was the dominant issue in the South in the early 1960s. Republican candidates such as Goldwater and Nixon were seen as much stronger opponents of forced desegregation and techniques like busing than were Democratic candidates such as Lyndon Johnson and Hubert Humphrey.

This is not to say that school desegregation alone cost Humphrey the election or even the South. Far too many factors account for the outcome of any election to point to a single decisive variable. The ideological conservativism of Southern Democrats made their alliance with the Democratic party inherently unstable and the shift to the Republican party in presidential elections likely would have come at some point regardless of school desegregation. Indeed, Humphrey was greatly hurt by Democrats who sat out the 1968 election in protest of Johnson's Vietnam policy.

As was expected, in the early 1970s, the Supreme Court was confronted with cases presenting major unresolved issues concerning school equality. Two cases were far more important than all of the others: *San Antonio Independent School District v. Rodriquez*, in which

the Court considered whether gross disparities in school funding deny equal protection;[51] and *Milliken v. Bradley*, where the Court considered whether interdistrict remedies could be fashioned in school desegregation cases.[52] In each instance, the Court's decision was by a 5-4 margin and in each case the majority was comprised of all four of the Nixon appointees and Justice Potter Stewart. The four dissenters in both cases were Justices Douglas, Brennan, White, and Marshall.

Together, *Rodriquez* and *Milliken* have created and have given constitutional legitimacy to separate and unequal schools. In *Rodriguez*, the Supreme Court refused to find that financing schools through local property taxes violated the equal protection clause of the Fourteenth Amendment. The plaintiffs challenged Texas's system of funding education largely through the property tax, which enabled wealthy school districts to tax at a low rate and spend a great deal on education, whereas poor districts taxing at high rates had little revenue for schools.

For example, the town of Edgewood, Texas had an assessed property value of $5,960 per pupil, taxed property owners at a rate of 1.00 percent of assessed valuation, and raised $26 for the education of each child. State and federal support increased Edgewood per pupil expenditures to $356. By contrast, the Alamo Heights, Texas school district had a property tax base of more than $49,000 per pupil. Implementing a tax rate of only .85 percent, the town of Alamo Heights raised $333 per student, which together with federal and state grants yielded a total expenditure of $594 per pupil.[53]

The Court held that strict scrutiny of the Texas system was inappropriate because neither a fundamental right nor a suspect classification was involved; the majority concluded that education is not a fundamental right and that poverty is not a suspect classification.[54] The Court therefore concluded that Texas's system needed only to meet a rational basis test, a test the Court found to be easily satisfied. The effect of *Rodriguez* was to institutionalize inequalities in school funding and "to foreclose a federal attack on inequitable school financing programs."[55]

In *Milliken*, the Court greatly restricted the ability of courts to fashion interdistrict desegregation orders. *Milliken* is particularly notable because it was the Supreme Court's first reversal of a desegregation order since *Brown*. In *Milliken*, the federal district court ordered 53

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51. 411 U.S. 1 (1973).
52. 418 U.S. 717 (1974).
53. 411 U.S. at 12-13.
54. *Id.* at 28, 33-37.
55. Roos, *The Potential Impact of Rodriquez on Other School Reform Litigation*, 38 LAW & CONTEMP. PROBS. 566 (1974).

suburban school districts to participate in desegregation of the Detroit schools.[56] On appeal, the Sixth Circuit recognized that "any less comprehensive a solution than a metropolitan plan would result in an all-black system immediately surrounded by practically all-white suburban school systems."[57] The court of appeals held that since "school district lines are simply matters of political convenience . . . they may not be used to deny constitutional rights."[58]

The Supreme Court reversed the imposition of a metropolitan-wide remedy. The Court reasoned that suburban school districts could not be included in the desegregation plan absent proof that they committed a constitutional violation. The Court, in an opinion by Chief Justice Burger, held that the metropolitan-wide remedy violated the equitable principle that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[59] The Court declared that "[t]o approve the remedy ordered would . . . impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."[60]

Although the Court did not completely rule out the possibility of judicially created metropolitan relief in all cases, the Court made it clear that such relief was to be viewed as an extraordinary remedy. The Court emphasized the importance of local control over schools, something that the Court believed was unjustifiably sacrificed by the lower court's order in *Milliken*.[61]

The ultimate effect of the decision in *Milliken* has been to prevent the judicial creation of metropolitan school districts, except in the most unusual cases.[62] As one commentator noted: "By fixing limits to the remedial power of the federal courts in desegregation cases, the Supreme Court, however, has thwarted this evolution in its earliest stages, and effectively removed from the realm of possibilities any constitutional attack on interdistrict school segregation arising from residential patterns."[63]

Milliken only permits interdistrict remedies if there is proof that the suburban districts committed a constitutional violation. Occasionally,

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56. Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

57. Milliken v. Bradley, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

58. 484 F.2d at 244.

59. 418 F.2d at 744 (citations omitted).

60. *Id.* at 745.

61. *Id.* at 741-44.

62. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 61, 69-71 (1974).

63. Comment, *Milliken v. Bradley in Historical Perspective: The Supreme Court Comes Full Circle*, 69 NW. U. L. REV. 799, 801 (1975).

this can be demonstrated. For example, a metropolitan remedy was imposed for Wilmington, Delaware because of the state's involvement in creating segregated schools.[64] Unlike Michigan in *Milliken*, Delaware once had required the segregation of all public schools in the state. In fact, Delaware had even gone so far as to subsidize transportation for white students out of the Wilmington district.

Nonetheless, these instances in which metropolitan remedies were permitted are clearly the exception. In case after case, the federal courts, following the dictates of *Milliken*, have refused to order metropolitan-wide remedies.[65] It is usually impossible to prove that the suburbs or state governments are directly responsible for the existence of segregated schools in the cities. As a result, after *Milliken* it is usually futile to hope for judicial action creating metropolitan school districts to eliminate the dual system of urban public education.

To understand the effects of the Burger Court on education it is essential to look at the decisions in *Rodriguez* and *Milliken* together. Justice Douglas, dissenting in *Milliken*, a year after *Rodriguez*, wrote: "Today's decision given *Rodriguez* means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but inferior."[66] *Milliken* means that effective desegregation is impossible because there is no way to combine white students in suburban areas with minority students attending city schools. *Rodriguez* means that these racially separate school systems will be unequal in resources because wealthier, white, suburban areas will spend much more money on schools than cities.

I believe that the decisions would have come out differently had the Warren Court continued. As mentioned earlier, both were 5-4 rulings with majorities comprised of Burger, Blackmun, Powell, Rehnquist, and Stewart, and dissents comprised of Brennan, Douglas, Marshall, and White. Certainly it is more likely that liberals such as Earl Warren and Abe Fortas would have agreed with the latter group and not the Nixon appointees. If even one more Justice had joined the liberal dissenters, the decisions would have come out the other way. Had Hubert Humphrey been elected President and made the four appointments to the Supreme Court, it is reasonable to surmise that one of them would have joined with Brennan, Douglas, Marshall, and White.

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64. 416 F. Supp. 328 (D. Del. 1976).

65. *See, e.g.*, Lee v. Lee County Bd. of Educ., 639 F.2d 1243 (5th Cir. 1971); Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978); Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1974).

66. *Milliken*, 418 U.S. at 761 (Douglas, J., dissenting).

The crucial question is whether it would have made any difference had *Rodriquez* and *Milliken* come out the other way. Some commentators, such as Gerald Rosenberg, argue that inherently judicial action had little chance of succeeding.[67] It is important to note that Rosenberg's argument—that courts have failed in securing equal educational opportunity—is precisely because of the decisions in *Rodriguez* and *Milliken*. Had these cases been decided differently, the reality Rosenberg describes might have indicated substantial judicial success in equalizing educational opportunity.

Indeed, experience with metropolitan school districts indicates that they do make a difference and in the few instances where tried, have decreased segregation. Although metropolitan school districts exist in very few major cities, where such systems have been implemented they have substantially reduced segregation and have equalized educational resources.[68] For example, a metropolitan district created in Indianapolis, Indiana decreased black inner city enrollment from forty to fifteen percent.[69] In addition, metropolitan districts would greatly reduce the inequities in school financing. A single tax base for the entire district would exist. No longer would wealthy sections of an urban area easily raise large sums of money while poorer areas struggle to raise less. Metropolitan districts would insure that the same amount is spent on the education of all students in an urban area: rich and poor, black and white.

Any predictions of events that did not occur are inherently suspect. My point is therefore not that the Warren Court or a Court dominated by Humphrey appointments would have assured equal educational opportunity. Perhaps social forces would have limited the Court's effectiveness. Professor Devins is certainly correct that "courts necessarily function within a political environment."[70] However, my central point is that there was an opportunity for the Court to advance equality of educational opportunity and that this opportunity was lost because of the Court's decisions in *Rodriquez* and *Milliken*.

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67. GERALD ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991).

68. Hain *Techniques of Governmental Regulation to Achieve School Desegregation*, 21 WAYNE L. REV. 79 (1976); Taylor, *Metropolitan-Wide Desegregation*, 11 INEQUALITY IN EDUCATION 45, 47-48 (1973).

69. United States v. Board of Sch. Comm'rs, 503 F.2d 68, 76 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); Manley, *Litigation and Metropolitan Integration*, 10 URB. LAW. 73, 95-102.

70. Neal Devins, *Interest Balancing and Other Limits to Judicially Managed Equal Educational Opportunity*, 45 MERCER L. REV. 1017 (1994).

Professor Devins responds to my criticism of the Burger Court by pointing to other decisions that helped advance school desegregation, such as the rulings in *Swann*, *Dayton Board of Education v. Brinkman*,[71] and *Columbus Board of Education v. Penick*.[72] Professor Devins is certainly correct that these were pro-civil rights decisions; where we disagree is as to the significance of these cases, especially compared to *Milliken* and *Rodriguez*.

Dayton and *Columbus* both concerned how discriminatory intent might be proven to establish a constitutional violation. But such proof has relatively little impact if the Court cannot impose a meaningful remedy for segregation and, as argued above, a metropolitan remedy would be needed to give adequate relief. Moreover, *Dayton* and *Columbus* only are civil rights victories because the Court earlier had ruled that proof of discriminatory intent is required to prove a violation of the Fourteenth Amendment. In *Keyes v. Denver*, the Court held that proof of segregation was not sufficient to establish a constitutional violation; rather, there needed to be proof that the segregation resulted from intentionally discriminatory policies.[73] This decision greatly limited the ability of courts to fashion desegregation remedies in northern cities that had not operated under Jim Crow laws.

Dayton and *Columbus*, and even some of the language in *Keyes*, made it somewhat easier to meet this proof requirement. However, had the Court decided *Keyes* differently and found that *de facto* segregation violates the Fourteenth Amendment, *Dayton* and *Columbus* would have been unnecessary.

IV. THE FUTURE

It is now twenty years since *Rodriquez* and *Milliken* and American public education is even more separate and even more unequal. What are the prospects for reform in the future?

There is little reason to believe that the Supreme Court will be the agent for effective change. In fact, the Court's most recent desegregation decisions indicate that the Court very much wants to get federal courts out of the area entirely. In *Board of Education v. Dowell*, the Court held that a federal court's desegregation order should cease once a school district attains a unitary system.[74] The Court emphasized the importance of there being an end to federal judicial supervision and of

71. 433 U.S. 406 (1977).
72. 443 U.S. 449 (1979).
73. 413 U.S. 189 (1973).
74. 111 S. Ct. 630 (1991).

returning control over school systems to local governments. Thus, the Court concluded that once a school system achieves unitary status and the district court dissolves its desegregation order, the court may reassert control over the system only upon proof of an independent constitutional violation.

In other words, even if dissolving the desegregation order will cause the immediate resegregation of the schools, there is no constitutional violation unless there is proof of additional discriminatory conduct.[75] For example, the desegregation order in Oklahoma City was very successful in eliminating one race schools; moreover, its dissolution would greatly increase the number of segregated schools. Yet, according to the Supreme Court this is irrelevant; if unitary status is reached, the desegregation order should be ended. The Court left ambiguous, however, what is sufficient to prove that there is now a unitary school system.

In *Freeman v. Pitts*, the Court held that once a portion of a federal court's desegregation order is implemented and followed, it should be dissolved, even if there are other parts of the order that have yet to be implemented.[76] The effect, again, is to limit federal court authority to achieve meaningful desegregation even in systems that had operated under Jim Crow laws.

Dowell and *Freeman*, and especially their emphasis on returning schools to local control, indicate that the Court is declaring victory over the problem of school inequality and simply giving up. Chris Hansen, who represented the plaintiffs in *Freeman*, made this point when he wrote: "The message between the lines in Dowell and Freeman is very clear: 'This is taking too long and is too hard. We've achieved everything that can be achieved. We give up.'"[77]

At the very least, *Dowell* and *Freeman* offer no hope that the Court will reverse course and be a force for equal educational opportunity. There is some possibility for action at the state level as state courts use the state constitution to equalize educational expenditures. Yet, this is unlikely to happen in more than a limited number of states and even then, it is likely to be accompanied by implementation of metropolitan school districts.

Nor is a major effort from Congress likely to occur. The political realities are such that it is extremely improbable that Congress ever

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75. Note, Bradley W. Joondeph, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 157 (1993).

76. 112 S. Ct. 1430 (1992).

77. Chris Hansen, *The Changing Vision of Equality in Education: Are the Courts Giving Up?*, 42 EMORY L.J. 863, 864 (1993).

would adopt a law to facilitate desegregation of the schools by creating metropolitan districts. Congress might increase level of grants, but given the federal budget deficit there is a limit to how much Congress can spend on education. The ideal solution would be for Congress to adopt a law creating metropolitan school districts. But at this time, no such a law is on the horizon.

V. CONCLUSION

Forty years after Brown I, thirty-nine years after Brown II, twenty-three years after *Swann*, is it not now time that America proceed with all deliberate speed to make educational equality a reality? There was a unique opportunity in the 1970s, but the Burger Court failed to realize the possibilities. Perhaps the opportunity will be there again and the promise of Brown will someday be realized. The costs of not acting are huge. As Justice Thurgood Marshall remarked:

> [W]e deal here with the right of all of our children, whatever their race, to an equal start in life and an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.[78]

78. *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting).